BEFORE THE PUBLIC UTILITIES COMMISSION

OF THE STATE OF HAWAIʻI

In the Matter of	)	
	)	
PUBLIC UTILITIES COMMISSION	)	Docket No. 2020-0218
	)	
For Approval of Power Purchase Agreement with AES West Kauaʻi Energy Project, LLC and to Include Costs in Kauaʻi Island Utility Cooperative's Energy Rate Adjustment Clause, and Other Matters Related to the West Kauaʻi Energy Project.	)	

PŌʻAI WAI OLA/WEST KAUAʻI WATERSHED ALLIANCE'S MOTION FOR RECONSIDERATION OF THE COMMISSION'S ORDER NO. 38095, FILED DECEMBER 1, 2021

MEMORANDUM IN SUPPORT OF MOTION

EXHIBITS "A" - "B"

AND

CERTIFICATE OF SERVICE

ISAAC H. MORIWAKE #7141
ELENA L. BRYANT #9548
EARTHJUSTICE
850 Richards Street, Suite 400
Honolulu, HI 96813
Telephone No.: (808) 599-2436
Email: imoriwake@earthjustice.org
ebryant@earthjustice.org

Attorneys for Pōʻai Wai Ola/
West Kauaʻi Watershed Alliance

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PŌ'AI WAI OLA/WEST KAUA'I WATERSHED ALLIANCE'S MOTION FOR RECONSIDERATION AND/OR CLARIFICATION OF DECISION AND ORDER NO. 38095, FILED ON DECEMBER 1, 2021

Pursuant to Haw. Admin. R. (HAR") § 16-601-137, Pō'ai Wai Ola/West Kaua'i Watershed Alliance ("Pō'ai Wai Ola"), by its counsel Earthjustice, respectfully seeks reconsideration and/or clarification of the Public Utility Commission's Order No. 38095, filed on December 1, 2021 ("D&O No. 38095" or "decision"), which granted Kaua'i Island Utility Cooperative's ("KIUC's") requests for approvals of its proposed West Kaua'i Energy Project ("WKEP" or "project"), including agreements between KIUC and developer AES West Kaua'i Energy Project, LLC ("AES"). Pō'ai Wai Ola does not request a hearing on this motion.

Based on the reasons detailed in the attached Memorandum in Support, Pō'ai Wai Ola respectfully requests that the Commission withdraw and defer its decision on KIUC's PPA until the mandated environmental review process under the

Hawai'i Environmental Policy Act ("HEPA"), Hawai'i Revised Statutes ("HRS") chapter 343 is complete. Further, Pō'ai Wai Ola requests that the Commission expressly order the following additional conditions, which are necessary to avoid unproductive mixed signals and confusion and undue pressure and momentum while HEPA review is still pending:

- The Commission's decision shall not be cited as support or justification in the HEPA process or in the approval processes of any other agency; each of these processes should be decided on its own merits.

- AES shall take the sole risk for any financial commitments it decides to make for the project while the HEPA process and other agency processes necessary for such commitments are still pending, and any such commitments shall not be cited as support or justification in these processes, including any subsequent approval processes of the Commission for the project.

- The Commission should clarify the discrepancy regarding whether "preconstruction" activities are allowed pending completion of the HEPA process. On page 102 of its decision, the Commission states that "*even* the 'normal and customary preconstruction activities to support permitting, project engineering and design efforts' cannot commence until the HEPA review process has been completed," which comports with the law. (Emphasis added.) However, on page 122 of the decision, the Commission states "construction at the Project site shall not commence (*other than* normal and customary preconstruction activities to support permitting, project engineering and design efforts)." (Emphasis added.)

- Automatically require KIUC to come back to the Commission once the HEPA review process is completed: KIUC shall file the final approved review document in this docket, and the Commission shall reconvene the docket so it can make findings on environmental, cultural, and public trust issues.

- Require KIUC to file a community engagement plan for the Commission's review and approval.

- In reporting on community engagement, in addition to the "status of KIUC's work to provide and/or support venues for community feedback and compile past outreach efforts into a single 'living' document reflecting

all community engagement," D&O No. 38095 at 120, KIUC shall include all community feedback received and responses to the feedback, and explain how project details, including community benefits, can be adjusted or enhanced based on community input and collaboration.

DATED: Honolulu, Hawai'i, December 13, 2021.

/s/ Elena L. Bryant
ISAAC H. MORIWAKE
ELENA L. BRYANT

Attorneys for Pō'ai Wai Ola

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MEMORANDUM IN SUPPORT

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I. INTRODUCTION

Pōʻai Wai Ola/West Kauaʻi Watershed Alliance ("Pōʻai Wai Ola"), by its counsel Earthjustice, respectfully seeks reconsideration and/or clarification of the Public Utility Commission's Decision and Order No. 38095, filed on December 1, 2021 ("D&O No. 38095" or "decision"), which granted Kauaʻi Island Utility Cooperative's ("KIUC's") requests for approvals of its proposed West Kauaʻi Energy Project ("WKEP" or "project"), including agreements between KIUC and developer AES. As discussed in further detail below, the decision is unreasonable, unlawful, and erroneous in contravening the Commission's statutory obligations under the Hawai'i Environmental Policy Act ("HEPA"), Haw. Rev. Stat. ("HRS") ch. 343, which mandates that the environmental review process be completed before the Commission approves the proposed project, so that the process can inform the Commission's decision-making, benefit "all parties involved and society as a whole," *id.* § 343-1, and ultimately help the success of the project. Instead, the Commission exempted its decision from HEPA, ignoring and nullifying the law, compromising the HEPA process by justifying substantial financial commitments and momentum for the project, and accepting a false choice in which developer ultimatums override legal protections of the environment. *See* Part III.A. The Commission's decision also ignored and undermined the agency's independent constitutional duties to safeguard the environment and public trust resources in refusing to allow the HEPA process to inform its consideration of these concerns, interests, and rights. *See* Part III.B. The Commission also diminished the importance of community engagement in reducing it to an afterthought, rather than a prior requirement

integrated into a meaningful HEPA process. *See* Part III.C. To uphold HEPA's mandate and purpose, Pōʻai Wai Ola requests the Commission to withdraw and defer its decision, particularly in light of the anticipated tax credit extensions in the pending Build Back Better Act—or to adopt further conditions to minimize any unproductive mixed signals and confusion or undue pressure and momentum while HEPA review is still pending. *See* Part III.D. These conditions should include, at minimum:

- The Commission's decision shall not be cited as support or justification in the HEPA process or in the approval processes of any other agency; each of these processes should be decided on its own merits.

- AES shall take the sole risk for any financial commitments it decides to make for the project while the HEPA process and other agency processes necessary for such commitments are still pending, and any such commitments shall not be cited as support or justification in these processes, including any subsequent approval processes of the Commission for the project.

- The Commission should clarify the discrepancy regarding whether "preconstruction" activities are allowed pending completion of the HEPA process. On page 102 of its decision, the Commission states that "*even* the 'normal and customary preconstruction activities to support permitting, project engineering and design efforts' cannot commence until the HEPA review process has been completed," which comports with the law. (Emphasis added; footnote omitted.) However, on page 122 of the decision, the Commission states "construction at the Project site shall not commence (*other than* normal and customary preconstruction activities to support permitting, project engineering and design efforts)." (Emphasis added.)

- Automatically require KIUC to come back to the Commission once the HEPA review process is completed: KIUC shall file the final approved review document in this docket, and the Commission shall reconvene the docket so it can make findings on environmental, cultural, and public trust issues.

- Require KIUC to file a community engagement plan for the Commission's review and approval.

- In reporting on community engagement, in addition to the "status of KIUC's work to provide and/or support venues for community feedback and compile past outreach efforts into a single 'living' document reflecting all community engagement," D&O No. 38095 at 120, KIUC shall include all community feedback received and responses to the feedback, and explain how project details, including community benefits, can be adjusted or enhanced based on community input and collaboration.

In this case, Pōʻai Wai Ola's motion is particularly fair and justified given how the Commission abruptly reversed its original intention "not . . . to issue a decision before environmental review is complete," Order No. 37733 at 5-6, in response to an excessive and overbearing 172-page reply statement to Pōʻai Wai Ola's statement of position, in which KIUC all but threatened the end of the proposed project if the Commission did not issue a decision under KIUC's demanded terms and deadline. Pōʻai Wai Ola respectfully requests an opportunity to advise the Commission of the legal errors and resulting harms in KIUC's demands and the Commission's decision, that hopefully the Commission can help avoid.

In sum, Pōʻai Wai Ola wishes to make clear its abiding belief that the best way for the Commission and parties to support the "win-win-win" principle and promise for this "first-of-its-kind" WKEP project is *to support the HEPA process*. In that spirit, Pōʻai Wai Ola requests the Commission's attention and care in this case and requests that the Commission grant this motion.

II. BRIEF PROCEDURAL BACKGROUND

In January 2019, KIUC prepared a Draft Environmental Impact Statement Preparation Notice ("EISPN") for the WKEP.[1] The Draft EISPN was never published. In the latter half of 2019, KIUC decided that, instead of proceeding directly to preparing an EIS, it would pursue the sequential environmental review process provided under HEPA and "start with a draft EA" (environmental assessment).[2] The draft EA was finally submitted on August 23, 2021, and public comments on the document have also been submitted.

On December 31, 2020, KIUC filed its Application for Approval of Power Purchase Agreement with AES ("Application") initiating this docket and urging the Commission to issue a decision and order "by no later than August 31, 2021" to "provide AES with sufficient comfort to make these decisions and commitments and commence the physical construction of the Project."[3] At the outset, KIUC was not forthcoming about its HEPA compliance obligations as related to the Project. In its initial filing, KIUC redacted all of the terms related to AES and KIUC's acknowledgement of the requirement of HEPA review for the project, and their corresponding obligations under HEPA. KIUC only released this information when the Commission specifically sent KIUC an initial Information Request ("IR") on February 3, 2021, requesting an explanation of "the status of any surveys, permits,

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[1] *See* KIUC's Response to CA/KIUC-IR-24c, filed on May 12, 2021, Attachment at 12 (response to Virtual Community Meeting Question #63).

[2] *Id.*

[3] KIUC Application at 1, 38-39.

and/or other compliance actions related to environmental review for the Project pursuant to all applicable federal and State laws."[4] On February 10, 2021, in response to this initial Commission IR, KIUC filed numerous unredacted pages of their Application and attachments with information on these regulatory requirements, including the HEPA environmental review process.[5]

Pōʻai Wai Ola has engaged in matters related to the proposed WKEP for many years, including the proceeding before the state Commission on Water Resource Management that produced the 2017 Mediation Agreement for the Waimea Watershed Area ("Watershed Agreement"). In joining that agreement, Pōʻai Wai Ola has been supportive of the concept of the project and its potential to offer a "win-win-win" for the West Kauaʻi community and beyond – but has also always understood that the details of the project would need to be fleshed out in a transparent public process enabling community collaboration and input on the proposal. To that end, and specifically as it relates to this proceeding, the Watershed Agreement recognized that the project would require government permits and approvals, and that "compliance with the requirements of HRS Chapter 343 will be necessary *prior to* agency action."[6]

On January 20, 2021, Pōʻai Wai Ola and the Hawaiʻi State Energy Office ("HSEO") filed their motions to intervene in this proceeding. Pōʻai Wai Ola

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[4] *See* PUC-KIUC-IR-101, filed on February 3, 2021.

[5] *See* KIUC's Response to PUC-KIUC-IR-101, filed on February 10, 2021, at pdf p. 3-4.

[6] Watershed Agreement at 4 (emphasis added).

intervened in order to protect its interests at stake in this proceeding, "including the interest in ensuring that the proposed project duly complies with the mandated processes and protections under the Hawai'i Constitution and HEPA statute before it is approved."[7]

In response to Pō'ai Wai Ola's intervention motion, KIUC filed an extensive and vehement opposition that demanded denial of Pō'ai Wai Ola's request and concluded with an afterthought that, "only to the extent the Commission feels obligated or compelled to permit Movant to participate in this proceeding to a certain degree," the Commission should restrict Pō'ai Wai Ola to a "limited participant status," subject to a slew of restrictions.[8] On March 22, 2021, the Commission issued Order No. 37691 which, among other rulings, denied Pō'ai Wai Ola's motion to intervene and instead granted it participant status. Recognizing Pō'ai Wai Ola's interest in the outcome of this docket in light of the proposed WKEP's potential environmental and cultural impacts, the Commission granted Pō'ai Wai Ola participation for the purpose of "addressing pending water rights and environmental review actions, including how such actions affect this docket." Order No. 37691 at 33-35.

On April 15, 2021, the Commission issued Order No. 37733, adopting KIUC's proposed procedural schedule and statement of issues, which was developed without any opportunity for participation or input by Pō'ai Wai Ola. Order No. 37733 at 2.

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[7] *See* Pō'ai Wai Ola's Motion for Intervention, Memorandum in Support at 2.

[8] *See* KIUC's Memorandum in Opposition to Pō'ai Wai Ola's Motion to Intervene at 24.

The order expressly indicated that "the Commission is closely monitoring the environmental review associated with the Project, and presently *does not intend to issue a decision in this Docket before environmental review is complete*." *Id.* at 5-6 (emphasis added).

During the designated period for written discovery, the Consumer Advocate ("CA"), Pōʻai Wai Ola, and the Commission issued various information requests on a range of issues, including the potential environmental and cultural impacts of the proposed project and the ongoing process of community engagement. On July 2, 2021, Pōʻai Wai Ola filed its statement of position. Under the procedural order, this statement was the only opportunity for the non-utility parties/participants to submit written input to the Commission. Pōʻai Wai Ola and the other non-utility parties/participants were not afforded an opportunity to respond to KIUC's or each other's position statements.

Only KIUC had the opportunity to file any reply statements, and they took full advantage. On September 30, 2021, KIUC filed an excessively lengthy, repetitive, and overbearing 172-page filing in response to HSEO's and Pōʻai Wai Ola's statements of position ("Reply Statement"). In its Reply Statement, KIUC urged the Commission more than a dozen times to issue a decision no later than December 1, 2021, arguing that "the viability of the Project . . . [is] at serious risk if the Commission waits to issue its decision until the HEPA environmental review is complete."[9]

[9] Reply Statement at 136.

On December 1, 2021, the Commission issued its Decision and Order No. 38095 ("D&O No. 38095" or "decision"), granting KIUC's requested approvals notwithstanding the ongoing HEPA review process, and adopting various conditions proposed by KIUC and slightly modified by the Commission. The D&O concluded by closing the docket, unless otherwise ordered by the Commission. *Id.* at 129.

III. DISCUSSION

A. The Commission's Decision Nullifies the Mandate, Purpose, and Benefits of HEPA.

In its decision, the Commission abruptly reversed its original intention not to issue a decision until the HEPA review process is completed. Instead, under extreme pressure from KIUC, the Commission carved out an exception for this project from HEPA's requirement of environmental review prior to decision-making and issued its final approval of the project on the exact deadline KIUC demanded, even though the HEPA process is still ongoing in an initial draft EA stage. As explained in this part, this decision ignored HEPA's express terms and misinterpreted the Hawai'i Supreme Court's rulings. Its end result compromised the HEPA process, by justifying extensive financial commitments and building bureaucratic momentum for the proposed project. Its reasoning effectively exempted not only this case, but also Commission decision-making in general, from HEPA compliance. Finally, the decision relied on a false choice between tax credits and compliance with HEPA, and adopted a makeshift and arbitrary balancing approach that invites abuse and undermines public confidence in the process.

1. The Commission's decision contravenes HEPA's express mandate that environmental review is a condition precedent to approval.

The Commission's decision ignores and sidesteps HEPA's requirement of prior environmental review, without basis in law. HEPA expressly mandates environmental review "*at the earliest practicable time*," when "the agency initially receiv[es] and agree[s] to process the request for approval." HRS § 343-5(e) (emphasis added). Moreover, completion of the environmental review process "*shall be a condition precedent to approval of the request* and commencement of the proposed action." *Id.* (emphasis added). This requirement of environmental review *before* agency decision-making is the core, defining purpose and principle of HEPA, which seeks to "ensure that environmental concerns are given appropriate consideration ***in*** *decision making* along with economic and technical considerations." HRS § 343-1 (emphasis added). *See also* HAR § 11-200.1-1(b) (requiring that "[a]gencies and applicants shall ensure that exemption notices, EAs, and EISs are prepared at the earliest practicable time," which "shall assure an early, open forum for discussion of adverse effects and available alternatives, and that the decision-makers will be enlightened to any environmental consequences of the proposed action prior to decision-making"). The Commission's decision addressed none of these express directives.

The Hawai'i Supreme Court has emphasized that HEPA review must occur "*early enough so that it can serve practically as an important contribution to the decision making process and will not be used to rationalize or justify decisions already made*." *Sierra Club v. Office of Planning*, 109 Hawai'i 411, 419, 126 P.3d

1098, 1106 (2006) (quoting *Citizens for Protection of N. Kohala Coastline v. Cnty. of Haw.*, 91 Hawai'i 94, 104-05, 979 P.2d 1120, 1130-31 (1999)) (emphasis by the Court). As the Court recognized and cautioned, "[a]fter major investment of both time and money, it is likely that more environmental harm will be tolerated." *Id.* (internal quotation marks omitted).

Contrary to this legal mandate, however, the Commission seeks to create an exception for its decision on the proposed project, rationalizing that the Commission's decision "does not control the Project's ability to physically be constructed on or otherwise use State lands," and that "construction of the Project cannot occur" until HEPA review is complete. Order 38095 at 106 n.313. This rationale does not follow from or comport with the law. By its terms, HEPA is not limited to "physical construction." Nor is HEPA review, once triggered, limited only to state lands.[10] Further, while HEPA specifically provides for coordination between agencies, the Court has rejected the argument that an agency can approve a project while deferring HEPA compliance to other agencies. In *Kahana Sunset Owners Association v. County of Maui*, 86 Hawai'i 66, 947 P.2d 378 (1997), for example, the Court rejected an agency's attempt to avoid complying with HEPA because another agency was responsible for approving the use of the public lands.

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[10] While the HEPA review requirement is triggered by various factors, including the use of state lands, the Court has long-established that the review responsibility is *not* limited to the state lands triggering HEPA review. In the *Kahana Sunset* case, for example, the use of state lands for a road underpass within a development project triggered HEPA review, but the scope of the required review covered the entire project, not just the underpass. *See Kahana Sunset Owners Ass'n v. Cnty. of Maui*, 86 Hawai'i 66, 74, 947 P.2d 378, 386 (1997).

Id. at 74-75, 947 P.2d at 386-87. Likewise, in the *Sierra Club* case, the Court rejected the agency's suggestion to defer HEPA compliance to "later stages" when the project "is ultimately built, as a result of the actions of other agencies." 109 Hawai'i at 418, 126 P.3d at 1105.

In line with these principles and precedents, "at the earliest practicable time" and "condition precedent to approval" should mean before the Commission approves the proposed project, including its structural, operational, and financial details as established in the proposed PPA and Development Agreement. As KIUC itself has emphasized, the Commission's approval is a major step forward for the project,[11] which is necessary and required "before the Project can go forward." *Sierra Club*, 109 Hawai'i at 418, 126 P.3d at 1105. It establishes rights, duties, and privileges of KIUC and AES and—based on KIUC's own extensive avowals, *see* Part III.A.2—will trigger major commitments of time and money to the project. Conducting HEPA review before Commission approval "comports with the purpose of HEPA to 'ensure that environmental concerns are given appropriate consideration in decision making.'" *Id.* It also avoids the potential pitfall of later HEPA review necessitating "burdensome reconsideration of decisions already made" and "provides a safeguard against a post hoc rationalization to support action already taken." *Id.* at 418, 419; 126 P.3d at 1105, 1106 (internal quotation marks and brackets omitted).

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[11] *See* Ex. A attached hereto (KIUC's press release calling the Commission's decision "a significant and important step in our effort to bring this innovative project to completion").

In a footnote, the Commission attempted to distinguish the Court's direction in *Sierra Club* from this case, stating that "the zoning reclassification at issue in *Sierra Club* directly related to the use of the State lands that triggered HEPA" and "was a condition precedent to the developer's use of State lands." D&O No. 38095 at 106 n.313. This distinction, however, lacks legal relevance. As the Court explained, the relevant point was that the project "requires the LUC's approval of the reclassification petition *before the Project can proceed*." *Sierra Club*, 109 Hawai'i at 418, 126 P.3d at 1105 (emphasis added). Neither the Court, nor the HEPA statute, refers to a "condition precedent to the . . . use of state lands." If that were the rule, then ostensibly this Commission would *never* need to comply with HEPA since—just as the Land Use Commission argued in *Sierra Club* that it "merely reclassifies land" and "has no authority to approve projects," *id.* at 417, 126 P.3d at 1104—the Commission also does not authorize the use of state lands. In *Sierra Club,* the Court maintained, "[h]ad the legislature intended to exempt all reclassification petitions from [HEPA], it could have easily so indicated." *Id.* at 416, 126 P.3d at 1103. The same applies here: HEPA applies to all agency approvals and does not exempt either the Commission generally, or PPA approvals specifically.

2. The Commission's decision causes the very harm HEPA seeks to prevent: an uninformed decision that justifies commitments and momentum for the proposed project.

According to the Commission, "[t]he rationale underlying the Alliance's argument that environmental review must be completed prior to the Commission's decision and order hinges on the potential for harmful or irreversible *environmental consequences of construction* and other *physical, environmental changes* before there

is a complete understanding of the Project's effects." D&O No. 38095 at 105-06 (emphasis added). Again, this focus on construction and other physical changes misses HEPA's purpose of *informing the decision-making process*, along with encouraging agency cooperation and coordination and enabling public input during that process. *See* HRS § 343-1. "The purpose of [HEPA] is to require decision-makers to consider whether there may be a significant effect on environmental quality *prior to the expenditure of money*." *Sierra Club v. Hawai'i Tourism Authority ex rel. Board of Directors*, 100 Hawai'i 242, 276, 59 P.3d 877, 911 (2002) (Moon, C.J., dissenting) (emphasis added).[12] "[T]here is an *increased risk* that environmental consequences may be overlooked as a result of deficiencies in the government's decision making process." *Id.* at 275, 59 P.3d at 910. Thus, it is "the *increased risk of significant environmental effects due to uninformed decision making*" that "is precisely the type of injury that chapter 343 was designed to prevent." *Id.* at 276, 59 P.3d at 911 (emphasis added).

Long-standing precedent under HEPA's federal counterpart, the National Environmental Policy Act, 42 U.S.C. §§ 4321 et seq. ("NEPA"),[13] establishes this principle that uninformed decision-making—and the momentum and commitments

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[12] While Chief Justice Moon, joined by another justice, dissented on the result of the case (dismissal for lack of standing), his rationale of the procedural purpose of HEPA and the nature of injury caused by the failure to follow its procedures was adopted by a majority of the court, including a third justice who wrote a separate concurrence. *See* 100 Hawai'i at 265-70, 59 P.3d at 900-05 (Nakayama, J., concurring); 100 Hawai'i at 270-85, 59 P.3d at 905-20 (Moon, C.J., dissenting).

[13] See *Price v. Obayashi Hawai'i Corp.*, 81 Hawai'i 171, 181, 914 P.2d 1364, 1374 (1996) (recognizing that NEPA provides guidance in interpreting HEPA).

to the project resulting from such decisions—is the harm from agency decisions not complying with the environmental review process. As the leading legal precedents on this issue (authored by now-Justice Breyer) explain, "the harm at stake is a harm to the *environment*, but the harm consists of the added *risk* to the environment that takes place when governmental decisionmakers make up their minds without having before them an analysis (with prior public comment) of the likely effects of their decision upon the environment." *Sierra Club v. Marsh*, 872 F.2d 497, 500 (1st Cir. 1989) (cited by *Sierra Club v. Haw. Tourism Auth.*, 100 Hawai'i at 275, 59 P.3d at 910 (Moon, C.J.)). Thus, "when a decision to which NEPA obligations attach is made without the informed environmental consideration that NEPA requires, the harm that NEPA intends to prevent has been suffered." *Commonwealth of Massachusetts v. Watt*, 716 F.2d 946, 952 (1st Cir. 1983). As the court further explained:

> [T]o set aside the agency's action at a later date will not necessarily undo the harm. The agency as well as private parties may well have become committed to the previously chosen course of action, and new information—a new EIS—may bring about a *new* decision, but it is that much less likely to bring about a *different* one. It is far easier to influence an initial choice than to change a mind already made up.

Id.

In *Watt*, the court expressly rejected the government's position that "the lease sale alone cannot hurt the environment" and "further steps" must be taken before oil exploration can begin, and determined that, if the proposed oil lease sales took place before environmental review, the successful oil companies would commit time and effort to planning the development, and the bureaucratic commitment would

become progressively harder to undo the longer it continues. *Id.* at 951-53. "Once large bureaucracies are committed to a course of action, it is difficult to change that course—even if new, or more thorough, NEPA statements are prepared and the agency is told to 'redecide.'" *Id.* at 952-53. Numerous other cases recognize and uphold this understanding and principle.[14]

Thus, contrary to the Commission's rationale, the purpose of HEPA's mandate of prior environmental review is not just to prevent "construction and other physical, environmental changes." Rather, the purpose is to avoid precisely what happened here, with the Commission making up its mind about the project without regard to environmental review; finalizing its decision unless "material changes" in the project's technical or economic terms may occur later, which only heightens the pressure to avoid any modifications or alternatives that may result in such material changes; approving contractual and financial commitments between the project development parties; and enabling the developer to make extensive

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[14] *See e.g., Friends of the Earth v. Hall*, 693 F. Supp. 904, 913 (W.D. Wash. 1988) (observing that "the risk of bias resulting from the commitment of resources prior to a required thorough environmental review is the type of irreparable harm that results from a NEPA violation"); *Protecting Arizona's Res. & Children ("PARC") v. Fed. Highway Admin.*, No. CV-15-00893-PHX-DJH, 2015 WL 12618411, *5 (D. Ariz. July 28, 2015) (citing *Marsh* and considering "bureaucratic momentum" as environmental harm from failure to comply with NEPA procedures); *Nat'l Wildlife Fed'n v. Nat'l Marine Fisheries Serv.*, No. 3:01-cv-0640-SI, 2017 WL 1829588, *14 (D. Or. Apr. 3, 2017) (holding that the commitment of "hundreds, tens, or even millions of dollars on [dam construction projects] during the NEPA remand period is likely to cause irreparable harm by creating a significant risk of bias in the NEPA process").

financial commitments toward the project—all while environmental review is still pending.

Indeed, KIUC itself proved this problem in insisting repeatedly in its Reply Statement that AES must (and now will) start spending substantial amounts of money to move the project forward, including the procurement of material and equipment built specifically for the proposed project that cannot be used for any other project. For example:

- "AES must incur *considerable monetary expenses, substantial investments of time,* and *initiate the process of sourcing* in order to coordinate the *significant and diverse procurements* needed for the Project." *Id.* at 25 (emphasis added).

- "[T]he Project requires *specialized* pipe, pumps, turbines and transformers that will be *custom-built for WKEP.*" *Id* (emphasis added).

- "[M]any of the substantive development decisions and commitments by AES, including the need to order several of the main pieces of the Project's equipment, will need to occur within the beginning to first half of 2022." *Id.* at 26.

- "AES has spent and is expected to spend on Engineering between the PPA signing and the end of 2021 is approximately *$2 million,*" "[t]he expected additional cost of required engineering work during the first half of 2022 is *$3 million,*" and "[t]he current estimated total contract value of this equipment is approximately *$15 million.*" *Id.* at 27-28 (emphasis added).

- ". . . to provide AES with sufficient comfort to enter into the above commitments and *to continue investing the extensive amount of time and resources.*" *Id.* at 28 (emphasis added).

- ". . . before making or committing to the *substantial investments of time and resources needed* especially for a project of this magnitude." *Id.* at 29 (emphasis added).

- ". . . especially given the specialized and Project-specific nature of the longest lead time *equipment that cannot be used on other projects.*" *Id.* at 30 (emphasis added).

- "This includes *ordering certain major equipment* that have an especially long lead time to receive and that will be *custom built for the Project and cannot be used for other projects*, and to keep *moving forward with the considerable time and resources that must be undertaken*." *Id.* at 42 (emphasis added).

- "AES will need to make many *substantive development decisions and commitments* within the beginning to first half of 2022, including *ordering several of the main pieces of the Project's equipment*" which includes "major equipment such as specialized pumps, turbines and transformers that will be *custom-built for WKEP and thus cannot be used for other projects if WKEP does not occur*." *Id.* at 99 (emphasis added).

In a particularly telling statement, KIUC insisted that the "main concerns with the Commission delaying its decision until completion of the environmental review are related to the *substantial costs and risks that AES must incur* in order to *keep the Project moving forward* without having *Commission approval* of the subject Application *on terms that would justify AES's continued investment*." Reply Statement at 23 (emphasis added). In short, this statement directly links and equates PUC approval on the developers' terms to a *justification* to incur substantial costs and risks, move the project forward, and continue project investments. The Commission's decision, moreover, endorsed this perspective and logic, observing that "AES will use the additional time resulting from the Commission's issuance of a decision and order prior to the completion of HEPA review to 'initiate the process of sourcing in order to coordinate the significant and diverse procurement needs for the Project.'" Order 38095 at 100-01.[15] As explained

[15] The Commission noted in passing that "AES undertakes the actions to procure this equipment for the Project at its own risk," *id.* at 101, but as experience shows, substantial investments undertaken after Commission approval heighten the pressure in support of the project, which is invariably imposed on agencies as an imperative for continuing forward, or a threat against changing course.

above, this is exactly the kind of self-justifying momentum that HEPA seeks to avoid, and expressly prohibits, by mandating environmental review as a condition precedent to agency approval.

Likewise, in response to the Commission's decision, KIUC and AES issued a joint press release announcing the Commission granting "approval of a power purchase agreement . . . for the development, construction, and operation" of the proposed project, and touting the decision as "a significant and important step in our effort to bring this innovative project to completion" *See* Ex. A. The press release listed various "benefits" stated in the Commission's decision, but made no mention of environmental or cultural concerns, or the ongoing HEPA process. While KIUC and AES are free to advertise in support of their interests, KIUC's view and portrayal of the decision highlights how the rushing to issue a decision on KIUC's terms, without HEPA compliance, undermines the integrity of the environmental review process and public understanding and confidence in its ultimate value.

3. The Commission's rationale for rushing its decision effectively exempts the Commission from any HEPA compliance.

The Commission's decision maintains that "the Commission is not 'exempting' or 'segmenting' itself from required environmental review by issuing this [D&O] now." D&O No. 38095 at 105. Yet, that is the ultimate consequence of the Commission's decision and reasoning. In this case, the Commission has indicated it has no obligation to consider HEPA in its decision-making either now or in the future, except only as it may result in "material changes" to the technical and

economic terms of the PPA. This perspective contradicts HEPA's express purpose of ensuring consideration of "environmental concerns . . . in decision making along with economic and technical considerations." HRS § 343-1. It also contradicts the direction of the Hawai'i Supreme Court confirming the Commission's constitutional duties to protect environmental and cultural rights and resources.[16] In response to these rulings, the Commission has more recently suggested in other cases that these constitutional duties are limited to the Commission's statutory duty under HRS § 269-6(b) to consider the impacts of fossil fuel reliance, including greenhouse gas ("GHG") emissions. As further explained in the subsequent Part III.B, the Commission's public trust duties are not limited by this statute; further, even on the specific issue of GHG emissions, a proper HEPA review process would help inform the Commission's GHG analysis and address potential emerging concerns that hydroelectric projects may cause significant GHG impacts (due to GHG emissions from reservoirs).[17] In any event, any suggestion that the Commission has no obligation to consider environmental concerns in the HEPA process does not comport with the HEPA statute or the constitution.

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[16] *See In re Gas Co.*, 147 Hawai'i 186, 465 P.3d 633 (2020).

[17] Pōʻai Wai Ola has submitted comments in the HEPA process raising these concerns and citing relevant information. *See* Pōʻai Wai Ola's Letter to Ian Hirokawa Re: West Kaua'i Energy Project – Draft Environmental Assessment, dated September 22, 2021, attached hereto as Exhibit B. In this case, the Consumer Advocate raised, and the Commission acknowledged, concerns about the quality of KIUC's GHG analysis. *See* D&O No. 38095 at 91-94. This analysis focused almost exclusively on GHG impacts from project construction, and not operation.

In focusing only on PPA terms and amendments and conditions on "construction," and rationalizing that "it does not control the Project's ability to physically be constructed on or otherwise use State lands," D&O No. 38095 at 106 n.313,[18] the Commission all but exempts itself from any consideration of environmental concerns—not just in this case, but in general. Indeed, by its reasoning, it is unclear when the Commission would ever consider HEPA review relevant or necessary to its decisions. The Commission can always claim to focus only on economic and technical terms, and it never controls any project's ability to be constructed on or use state lands. If the legislature had intended to broadly exempt the Commission or its PPA or other approvals from HEPA, the statute would have expressly said so.

While the Commission's decision "recognizes that a Commission decision prior to finalization of HEPA review may not be appropriate in all situations but sees this docket as distinct based on the specific circumstances," D&O No. 38095 at 107, the Commission offers no principled way to draw such lines in accordance with the law. If the Commission's position is that HEPA never applies to its decision making, as its reasoning indicates, then it should clearly say so. Otherwise, it should clarify its position on whether or when it must comply with HEPA, and how it is not "'exempting' or 'segmenting' itself" from HEPA in its decision.

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[18] Similarly, KIUC argued that PPA approval "does not in any way grant or provide KIUC or AES the approval it needs to . . . even begin to actually implement the construction of the Project." Reply Statement at 15.

4. The Commission's decision rests on a false and arbitrary choice, invites abuse, and undermines public confidence in the process.

In opining that it can, and must, allow selective compliance with HEPA's mandates based on its view of the "specific circumstances" of this case, the Commission's decision relies on a false choice—imposed by KIUC and AES—between complying with laws to protect the environment and rushing ahead with the project based on the current deadlines under their contract and the federal investment tax credit ("ITC"). The ITC is expected to be extended and expanded by pending legislation, and the Commission should consider how this development affects the key premise for its decision. Further, enabling developers to dictate their preferred level of compliance with HEPA by threatening abandonment of the project embarks on a precarious path and slippery slope. Any ad hoc "balancing" of the need for HEPA compliance based on the "specific circumstances" of each case has no basis in law and is doomed to be arbitrary in principle and practice. It also invites abuse by allowing developers' "comfort" and ultimatums to override the law. Such steamrolling of the HEPA process does not help inspire public confidence in the process or the project.

First, the belief that this case could be "forcing the Commission to choose," D&O No. 38095 at 107, between tax credits and the environment was a false choice forced by KIUC and AES. In its reply to Pō'ai Wai Ola's and HSEO's support of the Commission's original intent not to issue a decision until after HEPA review is complete, KIUC demanded that "a determination by the Commission to not issue its decision until completion of the HEPA environmental review would significantly

delay the implementation of the entire Project *and may even prevent the Project from ever occurring*," Reply Statement at 52 (emphasis added), and that "*the only*" way forward was to approve the project on KIUC's dictated terms, *id.* at 9, 104 (emphasis added). KIUC also specified a December 1, 2021 deadline for the Commission's decision, citing the contractual deadline after which AES *may* walk away from the project. In response, the Commission's decision observed that "[s]hould AES *feel* it is unable to capture the ITC, it *may* decide to terminate the PPA," D&O No. 38095 at 99, in justifying issuing its decision on KIUC's imposed deadline, without HEPA review.

KIUC based its deadline demands on the current ITC in-service deadline at the end of 2025. The federal ITC, however, has already been extended multiple times, and the pending Build Back Better Act, H.R. 5376, 117th Cong. § 136102, seeks to increase the credit to 30% and extend the deadline to include projects "the construction of which begins before January 1, 2032, and which is placed in service after December 31, 2021," among other expansions of renewable tax credit opportunities. While both HEPA review and the ITC extension are still pending, the Commission should withhold its decision on KIUC's Application so the Commission can consider all options—including complying with the HEPA process and the full consideration of environmental options that it enables and requires.

Second, the Commission should not base its decisions on HEPA on demands by developers that they may terminate the project if the HEPA process may not accommodate their deadlines. In response to such demands in this case, the

Commission engaged in a balancing-type exercise, in which it opined that "the risks of issuing a decision and order before HEPA review is complete in this situation are comparatively lower" than the "real and substantial risk of AES backing out of the PPA if the Commission delays issuing a decision and order." D&O No. 38095 at 99-100. Such makeshift balancing of HEPA's requirements fails to comply with the statute, which already establishes its balance in mandating prior environmental review. It is also arbitrary, giving the agency the prerogative to decide whether and how it will comply with its statutory obligations with respect to each case, project, or developer. Moreover, it invites abuse, encouraging developers to maximize pressure and momentum with contractual deadlines and ultimatum demands. KIUC and AES—not the Commission, other parties, or the public—have the control and responsibility to both develop their contract terms, and ensure timely compliance with environmental review.[19] If necessary, the timeframes and other terms in the PPA should be amended to enable compliance with HEPA—the law should not be reworked to fit the PPA terms. If the project is as beneficial and favorable as advertised, and is to realize its "win-win-win" goals as envisioned, then it should be able to follow the HEPA process without eliminating its chances of success as KIUC suggests.

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[19] In January 2019, KIUC prepared a Draft Environmental Impact Statement Preparation Notice ("EISPN") for the WKEP. *See* KIUC's Response to CA/KIUC-IR-24c, filed on May 12, 2021, Attachment at 12 (response to Virtual Community Meeting Question #63). The Draft EISPN was never published. In the latter half of 2019, KIUC decided that, instead of proceeding directly to preparing an EIS, it would pursue the sequential environmental review process provided under HEPA and "start with a draft EA" (environmental assessment). *Id.*

Indeed, proper compliance with the HEPA process should help, not hurt, the project's success by optimizing all its benefits, avoiding and mitigating its impacts, and enabling public input. In contrast, KIUC's push to preempt the Commission's process and cancel its HEPA compliance is not helping to inspire community trust in the process and project. As experience has shown, any short-term gains from rushing approvals and projects prior to environmental review are not conducive or sustainable over the longer term. Pō'ai Wai Ola continues to stress the importance for the Commission and all parties involved to "go slow to go fast," so that the legally mandated process may be followed and community trust may be restored. *See* Pō'ai Wai Ola's Statement at 20-21 & attached A'ana Declaration.

B. The PUC Also Failed to Comply with Its Public Trust Obligations.

In ignoring the legal requirements of HEPA and approving the proposed project without the benefit of environmental review, the Commission also ignored its independent constitutional duties to safeguard the environment and public trust resources. Indeed, HEPA review is a key mechanism for enabling *all* agencies, including this Commission, to comply with these constitutional duties by alerting them to environmental concerns and informing them of the environmental consequences of their decisions. The Commission's refusal to allow HEPA review to inform its decision, therefore, not only negates the purpose and benefit of that foundational statute for the Commission, but also forecloses the Commission from fulfilling its independent constitutional obligations to the public trust. The Commission's decision, instead, *undermines* the public trust by approving and enabling commitments that add self-justifying momentum to the project and erode

the integrity and public confidence in environmental review and other processes to protect the public trust.

The Hawai'i Supreme Court has made clear that the public trust mandate under article XI, § 1 of the Hawai'i Constitution applies to all agencies, including this Commission. *See In re Gas Co.*, 147 Hawai'i 186, 206-07, 465 P.3d 633, 653-54 (2020). These "constitutional public trust obligations exist independent of any statutory mandate and must be fulfilled regardless of whether they coincide with any other legal duty." *Ching v. Case*, 145 Hawai'i 148, 178, 449 P.3d 1146, 1176 (2019). These obligations are also "ongoing, *regardless of the nature of the proceeding*." *Gas Co.*, 147 Hawai'i at 207, 465 P.3d at 654 (emphasis added). "[A] state agency must perform its functions in a manner that fulfills the State's affirmative obligations under the Hawai'i constitution." *Id.*

Under the constitutional public trust doctrine, the state, including this Commission, has the "affirmative duty" to protect the public trust in natural resources, including water. *Kaua'i Springs, Inc. v. Planning Comm'n*, 133 Hawai'i 141, 172, 324 P.3d 951, 982 (2014). *Kaua'i Springs* and other subsequent cases establish an extensive framework of legal obligations for agencies issuing approvals for actions affecting public trust resources. *See* 133 Hawai'i at 171-75, 324 P.3d at 981-85. For example:

> • This Commission "must take the initiative in considering, protecting, and advancing public rights in the resource at *every stage* of the planning and decision-making process." *Kelly v. 1250 Oceanside Partners*, 111 Hawai'i 205, 231, 140 P.3d 985, 1011 (2006) (quoting *In re Waiāhole Ditch Combined Contested Case Hr'g*, 94 Hawai'i 97, 143, 9 P.3d 409, 456 (2000)).

- Similar to the statutory mandate under HEPA, the public trust calls for a "*thorough assessment* of the possible adverse impacts the development would have on the State's natural resources." *Id.* at 231, 140 P.3d at 1011 (emphasis added).

- The public trust also requires agencies to "consider the cumulative impact of existing and proposed diversions on trust purposes and to implement reasonable measures to mitigate this impact, including the use of alternative[s]." *Waiāhole*, 94 Hawai'i at 143, 9 P.3d at 455. *See also id.* at 161-62, 9 P.3d at 473-74 (comparing this requirement to consider mitigation and alternatives to the analysis required under HEPA).

- And absent such analysis, it cannot proceed: "it is manifest that a government body is precluded from allowing an applicant's proposed use to impact the public trust in the absence of an affirmative showing that the use does not conflict with [public trust] principles and purposes." *Kaua'i Springs*, 133 Hawai'i at 174, 324 P.3d at 984.

Here, the proposed project directly affects numerous public trust resources—most centrally water—which is a classic public trust resource with extensive, established legal precedents, including the *Kaua'i Springs* case. As the Commission observed, this case involves a "*first-of-its-kind project for the State*," where "comparisons to other existing projects in this State or KIUC's adherence to prior procedures are not as persuasive as they otherwise may have been." D&O No. 38095 at 73. Unlike any other type of energy projects the Commission may deal with, a hydro project directly depends on the use of public trust water resources. The amount and efficiency of water use directly determines the technical and economic aspects of the proposed project, including its finances, pricing, design, and operation. Impacts on public trust water resources are thus legally and practically inseparable from impacts on the proposed project's economic and technical assumptions and outcomes.

The Commission's decision, however, makes no mention of any public trust obligations. Rather, it simply rubberstamps the technical and economic side of the proposed project and closes out the docket, with no intent or interest in revisiting the decision unless there is a material change specifically in relation to those technical and economic details. This disregard of the public trust is directly at odds with the Hawai'i Supreme Court's ruling in *Hawai'i Gas*, which remanded a decision to the Commission to "consider its constitutional obligations" under the public trust. 147 Hawai'i at 207, 465 P.3d at 654.

While the Commission's decision in this case is silent on the public trust, the Commission has indicated in other cases that its public trust duties are limited only to the specific confines of its statutory authority under HRS § 269-6 to consider the effects of fossil fuels including greenhouse gases.[20] This ignores well-settled precedent that constitutional duties under the public trust are "independent of statutory duties and authorities created by the legislature." *Kaua'i Springs*, 133 Hawai'i at 172, 324 P.3d at 982. In this case, the Commission's public trust obligations include the duty to consider greenhouse gases and their indirect impacts on trust resources, including water; they also include the duty to consider, avoid, and mitigate the direct impacts to water resources in the design and operation of this hydro project.

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[20] These other cases include *In re Maui Elec. Co.*, Docket No. 2018-0433, which is currently pending before the Hawai'i Supreme Court. In that case, however, the Commission acknowledged that it does have the authority in its statutes to "balance technical, economic, environmental, and cultural considerations associated with modernization of the electric grid." *See* HRS § 269-145.5(b).

While other agencies may focus more specifically on protecting water resources, the Hawai'i Supreme Court's ruling in *Kaua'i Springs* makes clear that this Commission still has the duty to exercise its own due diligence, rather than passing off these obligations to other agencies then passively receiving second-hand reports in a closed docket. Like this case, *Kaua'i Springs* involved an agency (the county planning commission) issuing an approval (land use permit) necessary for the proposed action (a water bottling operation), but not directly permitting the diversion, use, or delivery of the water itself. The Hawai'i Supreme Court affirmed the agency's decision to consider and uphold the public trust and require more information whether the use of water was justified. The same principles apply here. *Kaua'i Springs* confirms that (1) all agencies, including the Commission, are subject to the constitutional public trust, and (2) at least some level of inquiry, consideration, and protection of the public trust and coordination between agencies is necessary to fulfill the public trust, rather than simply a rubberstamp approval under the assumption that some other agency may take the initiative to require modifications to protect the public trust in the future.

Again, in this case, HEPA review is the mechanism for all agencies, including this Commission, to fulfill their public trust obligations, by ensuring that "environmental consciousness is enhanced, cooperation and coordination are encouraged, and public participation during the review process benefits all parties involved and society as a whole." HRS § 343-1. The Commission had previously, and correctly, indicated its intent "not . . . to issue a decision in this Docket before

environmental review is complete." Order No. 37733 at 6. Pōʻai Wai Ola (and the Hawaiʻi State Energy Office) supported this intention, and Pōʻai Wai Ola further explained various unresolved questions and concerns about the details of how the proposed project would take, use, and discharge water resources, which would cause impacts on both the waters being diverted, and the waters into which excess water would be dumped. All of these issues, and more, should be addressed in the HEPA process, with opportunities to engage the community, gather and incorporate feedback, and consider and implement mitigation and alternatives that may include ways to modify the design and operation of the project. Under excessive pressure from KIUC, however, the Commission flipped on its intention, abdicated its obligations under both HEPA and the constitutional public trust, and approved escalating commitments to the project that undermine the up-front and unbiased inquiry into environmental impacts that the statute and constitution demand.

C. The Commission's Decision Reduced Community Engagement to an Afterthought, Rather than a Prior Requirement.

The Commission's decision to avoid compliance with HEPA also diminished the importance and effectiveness of community engagement for the proposed project. The Commission stated that it "believes effective community outreach is essential to achieving the State's clean energy goals and emphasizes the importance of community engagement for this and future PPAs." D&O No. 38095 at 96. Indeed, HEPA provides the *legally mandated* process for effective and essential community engagement, to benefit "all parties involved and society as a whole." HRS § 343-1. The Commission's decision, however, relegated the HEPA process,

along with the community engagement that it seeks to foster, to an afterthought to its decision, rather than a meaningful prior requirement.

Consistent with its requirement of prior environmental review, HEPA's community engagement process is meant to be front-loaded. It also must be iterative. In preparing HEPA documents, applicants "are to make every effort to . . . [c]onduct any required consultation as mutual, open and direct, two-way communication, in good faith, to secure the meaningful participation of agencies and the public in the environmental review process." HAR § 11-200.1-1(c)(3). The Commission's decision to rush ahead with its approval of the proposed project, and passively receive reports of community engagement efforts afterward, foreclosed opportunities for such community engagement to inform the Commission's decision making.

In purporting to evaluate KIUC's community engagement plans, the Commission simply repeated KIUC's representations regarding its community engagement efforts. For example, the Commission quoted KIUC's statement that "it is not aware of any individuals or groups who oppose the Project." D&O No. 38095 at 96. But as Pōʻai Wai Ola explained, they and other West Kauaʻi community members still lack critical details on the project's environmental and cultural impacts. In the context of still-ongoing HEPA review, therefore, statements by KIUC that "no 'formal opposition' has been expressed in public meetings . . . should not be taken as community approval or consent for the project." Aʻana Declaration, at 7, ¶ 19.

The Commission nonetheless found that "KIUC has fulfilled its community outreach efforts consistent with the development Agreement." D&O No. 38095 at 96. But that agreement, under § 5.06, requires KIUC and AES to "jointly draft a community engagement plan . . . that identifies all of the stakeholders at the federal, state and county levels, including individual Kauai residents and community planning groups and a plan to generate community support for the Project, including how the Project will deliver positive and effective outcomes for the community." KIUC Application, Exhibit 2 at 24. KIUC has not submitted any such plan into the record or confirmed that one has actually been prepared. The Commission thus has no basis for concluding that "KIUC has fulfilled" its community outreach obligations either under its agreement—or more critically, under the mandated HEPA process—because it approved KIUC's project before allowing meaningful community engagement to take place.

D. The Commission Should Reconsider or Clarify Its Decision to Comply with HEPA and Avoid Unproductive Mixed Signals and Undue Pressure and Momentum while HEPA Review Is Pending.

The Commission should withdraw and defer its decision on KIUC's Application until HEPA review is completed. As stated, the pending Build Back Better Act provides an opportunity for the Commission to reconsider its primary rationale for rushing its decision without HEPA review; the Commission should at least defer its ruling on this motion until that legislation is finalized.

In the meantime, and if the Commission decides not to withdraw and defer its decision until HEPA review is completed, additional conditions and clarifications

are warranted and necessary to minimize any unproductive mixed signals and confusion or undue pressure and momentum while HEPA review is pending. At minimum, Pō'ai Wai Ola urges the Commission to consider and add the following conditions to the current list that the Commission adopted based on KIUC's input:

- The Commission's decision shall not be cited as support or justification in the HEPA process or in the approval processes of any other agency; each of these processes should be decided on its own merits.

- AES shall take the sole risk for any financial commitments it decides to make for the project while the HEPA process and other agency processes necessary for such commitments are still pending, and any such commitments shall not be cited as support or justification in these processes, including any subsequent approval processes of the Commission for the project.

- The Commission should clarify the discrepancy regarding whether "preconstruction" activities are allowed pending completion of the HEPA process. On page 102 of its decision, the Commission states that "*even* the 'normal and customary preconstruction activities to support permitting, project engineering and design efforts' cannot commence until the HEPA review process has been completed," which comports with the law. (Emphasis added; footnote omitted.) However, on page 122 of the decision, the Commission states "construction at the Project site shall not commence (*other than* normal and customary preconstruction activities to support permitting, project engineering and design efforts)." (Emphasis added.)

- Automatically require KIUC to come back to the Commission once the HEPA review process is completed: KIUC shall file the final approved review document in this docket, and the Commission shall reconvene the docket so it can make findings on environmental, cultural, and public trust issues.

- Require KIUC to file a community engagement plan for the Commission's review and approval.

- In reporting on community engagement, in addition to the "status of KIUC's work to provide and/or support venues for community feedback and compile past outreach efforts into a single 'living' document reflecting all community engagement," D&O No. 38095 at 120, KIUC shall include

all community feedback received and responses to the feedback, and explain how project details, including community benefits, can be adjusted or enhanced based on community input and collaboration.

IV. CONCLUSION

Pōʻai Wai Ola supports the "win-win-win" principle and promise for the proposed WKEP by supporting the HEPA process. For the reasons discussed above, Pōʻai Wai Ola respectfully requests that this Commission likewise uphold the public interest in the HEPA process and the benefits for the proposed project, all parties involved, and society as a whole, in granting this motion.

DATED: Honolulu, Hawai‘i, December 13, 2021.

/s/ Elena L. Bryant
ISAAC H. MORIWAKE
ELENA L. BRYANT
EARTHJUSTICE

Attorneys for Pō‘ai Wai Ola

FOR IMMEDIATE RELEASE
12/02/2021
Contact: Beth Tokioka
808.246.4348
btokioka@kiuc.coop

Power Purchase Agreement for West Kaua'i Energy Project Receives PUC Approval

Līhu'e, Kaua'i, HI – December 2, 2021 – The Hawai'i Public Utilities Commission (PUC) has granted approval of a power purchase agreement (PPA) between Kaua'i Island Utility Cooperative (KIUC) and a subsidiary of The AES Corporation (AES) for the development, construction, and operation of the West Kaua'i Energy Project (WKEP): a proposed pumped-storage hydropower facility coupled with solar and battery storage.

"This is a significant and important step in our effort to bring this innovative project to completion, which will move Kaua'i to more than 80% renewable generation and provide up to 25% of Kaua'i's power supply," said KIUC's President and Chief Executive Officer, David Bissell.

The PPA provides the commercial terms for the sale of electricity and capacity from WKEP to KIUC if or when the project comes on-line, including operational requirements, the schedule for delivery of electricity, penalties for under delivery, and pricing and payment terms.

In its approval, the PUC noted the following, among other benefits:

- WKEP is expected to result in a significant net reduction in lifecycle and operational greenhouse gas emissions.
- WKEP represents a new type of renewable energy for the State, featuring a first-of-its-kind pumped hydro storage facility paired with a battery energy storage system.
- The additional capacity of the project is beneficial because it would increase KIUC's system reliability and grid stability.
- The PPA represents a significant step not only towards Hawai'i's renewable energy goals consistent with current Hawaii law, but also towards lower energy prices.
- KIUC's fossil fuel consumption will be reduced by approximately 8.5 million gallons of fuel annually.

Bissell noted that WKEP will deliver many benefits to KIUC's members and the community-at-large, including stabilizing and lowering electricity rates over time, opening up dormant agricultural lands for production, maintaining mandated streamflow for four streams in Kōke'e, and increasing public access and recreational opportunities.

(more)

EXHIBIT A

"The input received by the community and stakeholders to date in addition to the PUC's timely review of the PPA is much appreciated," said Woody Rubin, AES Clean Energy Chief Development Officer. "There is much work yet to be done in order to bring the project to operation. AES looks forward to continuing our successful partnership with KIUC and delivering with it the numerous opportunities the project offers."

A copy of PUC Decision and Order No. 38095, which includes the specific approvals and conditions imposed by the PUC, may be found on KIUC's website at: www.kiuc.coop/wkep.

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EARTHJUSTICE

September 22, 2021

Via Electronic Mail
Ian Hirokawa
State of Hawai'i, Department of Land and Natural Resources
1151 Punchbowl Street
Honolulu, HI 96813
ian.c.hirokawa@hawaii.gov

Re: West Kaua'i Energy Project – Draft Environmental Assessment

Dear Mr. Hirokawa:

Earthjustice submits these comments on behalf of Pō'ai Wai Ola/West Kaua'i Watershed Alliance ("PWO"), in response to the August 23, 2021 solicitation for public comment on the West Kaua'i Energy Project ("WKEP") Draft Environmental Assessment ("DEA"). PWO is a community-based organization rooted in West Kaua'i and is dedicated to managing and conserving water resources for present and future generations, and protecting the long-term sustainability and health of the entire Waimea River system from its mauka headwaters to makai nearshore marine areas.

PWO has engaged in related legal processes directly bearing on the proposed WKEP project for the better part of a decade. PWO has participated in proceedings before the state Commission on Water Resource Management ("CWRM") regarding the protection and restoration of instream flows in the Waimea River system and management and oversight of diversions for offstream uses, including commercial agriculture and hydropower. In July 2013, PWO brought a petition to restore streamflow that resulted in a Mediation Agreement for the Waimea Watershed Area ("Watershed Agreement") and CWRM order increasing the interim instream flow standards ("IIFS") for Waimea River and providing an opportunity for the Kaua'i Island Utility Cooperative ("KIUC") to pursue due diligence of the proposed project. In January 2021, PWO also petitioned the Public Utilities Commission to intervene in proceedings related to the proposed WKEP and was granted participant status in the docket.

As KIUC pursued its due diligence, PWO members participated in early consultation for the ongoing environmental review process for the proposed WKEP. PWO has been watching the development and disclosure of the details of the project with growing concern. Having now reviewed the DEA in its entirety, PWO submits these comments to raise various questions and concerns related to the proposed project that must be addressed to ensure that the project fully realizes its "win-win-win" promise, centered first on the West Kaua'i community that would be hosting the project. PWO has raised many of these questions and concerns from an early stage,

EXHIBIT B

starting more than a year ago during the early consultation phase for the DEA, yet these issues still remain unaddressed or ignored in the current document.

A. <u>There is no question that the proposed WKEP may have a significant impact on the environment, thus necessitating full environmental review and the preparation of an Environmental Impact Statement.</u>

Pursuant to Hawai'i Administrative Rules ("HAR") Chapter 11-200.1, "[i]n considering the significance of potential environmental effects, agencies shall consider and evaluate the sum of effects of the proposed action on the quality of the environment." *Id.* § 11-200.1-13(a). Moreover, "an action shall be determined to have a significant effect on the environment **<u>if it may</u>**," among other factors, "[i]rrevocably commit a natural, cultural, or historic resource," "[c]urtail the range of beneficial uses of the environment,"[1] or "[h]ave a substantial adverse effect on or be likely to suffer damage by being located in an environmentally sensitive area such as a[n] . . . estuary, fresh water, or coastal waters. *Id.* § 11-200.1-13(b) (emphasis added). Water diversion is an integral part of the proposed WKEP, and KIUC will seek a long-term (65-year) lease to divert a variable flow equivalent to a multi-year rolling average of 11 million gallons of water per day ("mgd") from the Waiakōali, Kawaikōī, Kaua'ikinanā, and Kōke'e Streams. (DEA at 15, 17.) This equates to 4 billion gallons of water annually, and nearly 1.5 trillion gallons of water over the course of the proposed 65-year water lease term.[2] These proposed diversions represent a significant commitment of stream flows, which will be removed from its watershed of origin, conveyed through the project, and ultimately directed to the Mānā Plain for irrigation and/or disposed as pollutant discharges through the Mānā drainage system and into the ocean.

As further explained below, KIUC completely overlooks the significant impacts from the long-term commitment of 11 mgd from the Waimea River, the discharge of up to 26 mgd of excess water along the shoreline, and potential double diversions of the Waimea River via both the Kōke'e and Kekaha ditch systems. There is no question that a project of such historic scale and complexity as the proposed WKEP, which will outlast most of our lifetimes, not only "may," but will, have a significant impact on the environment and should therefore be required to undergo full environmental review and the preparation of a full environmental impact statement ("EIS"). Allowing the project to evade full environmental review and the preparation of an EIS is not only legally mistaken, but also sets a bad precedent and sends the wrong

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[1] "Environment" is defined under HAR § 11-200.1-2 as "humanity's surroundings, inclusive of all the physical, economic, cultural, and social conditions that exist within the area affected by a proposed action, including . . . water."

[2] For perspective, 11 million gallons of water per day is more than the instream flow standards for both Waihe'e and Wailuku Rivers in Nā Wai 'Ehā on Maui, which are the two largest rivers on that island.

message for this and other communities being asked to host such major renewable energy projects.[3]

B. The DEA fails to identify the proper baseline for analysis of impacts to the Waimea River and stream habitat.

The DEA acknowledges that "[t]he community consultation process for this project area has identified the importance of water to those residents of Hawaiian Home Lands and the Waimea Ahupua'a." (DEA at 110.) Moreover, "[t]he traditional and cultural practices of the Waimea Ahupua'a in the past, present, and future all depend on the need for continued water sources." (DEA at 110; emphasis added.) While PWO supports the elimination of the use of 8.5 million gallons of fossil fuel annually (DEA at 11), the environmental and cultural costs of expending 4 billion gallons of river water for this purpose must be fully addressed in this environmental review process.

The DEA uses a baseline for assessing potential impacts on water resources that "takes into account that the Kōke'e Ditch Irrigation System is an existing diversion system that has been in place and operational since the early 1900's." (DEA at 79.) According to the DEA, "[t]his EA is not intended to address pre-diversion status and condition of the associated streams and the Waimea River watershed . . . . For the purpose of this EA, the analysis of potential impacts is based on the current condition and uses within the Waimea River watershed and the surrounding environment." (DEA at 79; emphasis added.) This focus on the "existing" diversions and "pre-diversion" conditions ignores that, currently, stream flows are (or should be) almost fully restored because little or no offstream uses exist, and the Watershed Agreement requires that stream flows be restored to the maximum extent possible, and that any unused water remain in the stream to prevent unlawful waste. (DEA, Appendix A at 2, 6.) This restored condition would continue in the absence of the scale of diversions proposed for the WKEP. The DEA ignores this current condition and the impacts of renewing large-scale diversions and precluding a long-term restoration and revival of the stream ecosystems. Proper environmental review must analyze the impacts of the proposed 11 mgd diversion in relation to a no diversion baseline, or at the very least, in comparison to current flow conditions restored under the Watershed Agreement and the expected benefits from this almost full restoration of flows.

C. The DEA fails to address impacts to native stream life.

The DEA also fails to address impacts to native stream life such as the 'o'opu, 'ōpae, and hihiwai. Instead, the DEA maintains that the proposed WKEP's water diversions would improve conditions over historical (i.e., plantation-era) diversion levels since it will leave more water in the stream than historically allowed. For the reasons discussed above, comparing the

[3] In January 2019, KIUC issued a draft EIS preparation notice, but it subsequently opted to proceed with the preparation of an EA. (DEA, Appendix J PDF at 942, 953.)

proposed project's impacts to historical diversions, which destroyed habitat for native stream life by fully diverting streams and leaving streambeds bone dry, is not the appropriate comparison for analyzing the project's impacts to stream life today. Such an analysis ignores the impacts from the long-term removal of 11 mgd on instream uses and values, including ecosystem health and Native Hawaiian rights. It also is inconsistent with the recognition elsewhere in the DEA, under the "no-action alternative" analysis, that if the Kōke'e Ditch Irrigation System were to be closed and diversion structures removed such that all flow would be retained in the stream "there would be beneficial impacts to other native and invasive stream biota downstream of the diversions." (DEA at 105.)

D. The DEA improperly relies on the Watershed Agreement's IIFS for its finding of no significant impact.

The DEA relies on the Watershed Agreement to justify its proposed finding of no significant impact, suggesting in effect that the Watershed Agreement disposes of the need to conduct proper analysis of the impacts of flow diversions. According to the DEA, the proposed WKEP's "implementation of the Phase Two IIFS would minimize impacts to diverted streams by maintaining flow volumes in stream channels that have been determined by CWRM sufficient to meet the instream needs including those of aquatic habitat and stream biota." (DEA at 82.) The DEA further claims that the Phase Two IIFS "has been set by CWRM and deemed sufficient to meet the instream needs including stream biota and habitat" and "would improve habitat suitability." (DEA at 144, 104.) These assertions misstate the intent and effect of the Watershed Agreement.

In setting the IIFS for the Waimea River streams and tributaries, CWRM did not do any analysis or make any findings that the IIFS in the Watershed Agreement were sufficient to meet instream needs. Instead, it was understood by the parties to the Watershed Agreement that KIUC was to do its due diligence to ensure that the proposed project was environmentally and economically advisable and feasible. A guiding principle of the Watershed Agreement provides that "[a]ny diversion of water from a stream must be justified with no more water taken than is needed for other beneficial uses, and even then, the health of the stream must be preserved at all times." (DEA, Appendix A at 2; emphasis added.) In order to allow KIUC to move forward with the project, certain understandings and agreements were made to allow KIUC the ability to perform its due diligence, including biological due diligence, on the project. (DEA, Appendix A at 4.) The Watershed Agreement also includes as an operating protocol that "[c]ontrolled releases and biological studies will be part of any protocol to help determine the best ongoing uses of water." (DEA, Appendix A at 10.) In sum, the Watershed Agreement was never intended to serve as a finding that the proposed IIFSs and 11 mgd of offstream diversions were sufficient to meet instream needs, or a substitute for KIUC's responsibility to conduct the actual necessary analysis and disclosure of the impacts in an EIS. The DEA thus cannot simply rely on the Watershed Agreement to justify a finding that the removal of 11 mgd of water from the Waimea River will have no significant impact. Instead, the DEA must independently analyze

impacts to instream uses and values. *See* HAR § 11-200.1-18 (requiring identification and analysis of impacts).

E. The DEA fails to analyze impacts associated with the discharge of diverted flows with no consumptive end use.

A key understanding and principle of the Watershed Agreement is that unused waters must remain in, or be returned to, the Waimea River system. (*See* DEA, Appendix A at 9.) The underlying intent and spirit is that water removed from the streams would be beneficially used for both hydropower generation and agricultural end uses, and not simply diverted for hydropower and then dumped or wasted. The DEA indicates, however, that up to 26 mgd of the water diverted would not only be dumped, but also discharged along the shoreline, where it would contribute to ongoing problems of nearshore ocean water pollution. This raises multiple concerns regarding the proposed WKEP's impact to environmental and cultural resources along the shoreline and nearshore waters.

a. The DEA fails to analyze impacts to the shoreline, nearshore ecosystem, and ocean due to the potential 26 mgd discharge from the proposed WKEP.

The DEA states that "[t]he expected average Project discharge would be between zero and 10 MGD . . . However, the maximum theoretical daily discharge from Mānā outlet into the drain system would be 26 MGD." (DEA at 27; emphasis added.) This water would exit the Mānā Plain through a shoreline discharge point. (DEA at 27.) The DEA completely ignores, however, the impact that the potential discharge would have on the nearshore ecosystem.

The discharge of up to 26 mgd along the shoreline also conflicts with the Hawai'i's Coastal Zone Management Program's objective to protect valuable coastal ecosystems, including reefs, from disruption and to minimize adverse impacts on all coastal ecosystems. Hawai'i Revised Statutes ("HRS") ch. 205A-2(b)(4). The DEA states "[t]he Proposed Action is not in a coastal area and would have no impacts to marine resources." (DEA at 176.) The impacts of the proposed WKEP, however, do not stop at only the footprint of the proposed hydroelectric facilities. This myopic view improperly disregards the nearshore water quality impacts of the discharge of up to 26 mgd of excess water through miles of legacy coastal drainage ditches and fails to analyze the impacts of such ongoing and increased pollution through these ditches on coral reefs, endangered species, and other marine resources.

b. The DEA fails to account for pollution impacts from use of the legacy plantation drainage ditches.

The DEA mentions that "[a]ny water not used for irrigation or not pumped back up to Pu'u 'Ōpae Reservoir would flow into an existing Mānā storm drainage system comprised of a network of earthen ditches totaling 40 miles in length built in the early 1920's to drain storm water." (DEA at 26.) Yet, the DEA fails to analyze the pollution impacts from the dumped

water flowing through these plantation-era dirt ditches, picking up sediment, pesticides, heavy metals, and other contaminants along the way, then discharging into the ocean. Indeed, such pollution discharge from these ditches was the subject of a recent federal lawsuit, in which the court ruled the discharge unlawful without a federal Clean Water Act permit.[4] The DEA indicates that such a permit would be required for stormwater discharge associated with construction activities (DEA at 67, 81, 87), but makes no mention of any permit for the discharge to the shoreline from the operation of the proposed project. The DEA must disclose and analyze these details, including the primary and cumulative impacts of the pollution discharges through the Mānā Plain drainage system, as well as proposed mitigation measures.

c. The DEA fails to account for *actual* agriculture needs and plans, particularly on the Mānā Plain.

The DEA suggests that the current draws along the Kōke'e ditch system would meet or exceed the diversion of water that is proposed as part of the WKEP. Specifically, the DEA concludes that "[t]he total quantity of these users[']draws is up to 16.65 MGD, which is more water than the annual average diversion volume [of 11 MGD]." (DEA at 32-33.) The table supporting this conclusion includes the Department of Hawaiian Home Lands' 6.93 mgd water reservation, as well as 10 mgd to support the Agribusiness Development Corporation's ("ADC's") Makai/Mānā Plain tenants and the Kekaha Agricultural Association ("KAA") uses. The DEA provides no basis for the 10 mgd projection, which is not supported by any available data. In 2020, for example, agricultural water use on the Mānā Plain averaged 1.3 mgd; so far in 2021, it has averaged 1.8 mgd. This is nowhere near the 10 mgd purportedly allocated to ADC/KAA agricultural needs.

The DEA contains no data or analysis on current water demand, nor does it contain any information and support as to when the expected 16.65 mgd demand would potentially materialize, if ever. KIUC has suggested at times that its kuleana is merely to provide irrigation delivery, regardless of whether any actual agricultural use on the Mānā Plain occurs. To the contrary, ensuring beneficial use of water for actual agricultural needs on the Mānā Plain is a critical and central component of the operation of the proposed WKEP, whose express purpose and justification includes "[i]rrigation delivery to support diversified agriculture on lands adjacent to the Project site . . . and the agricultural fields on the Mānā Plain." (DEA at 1.) The DEA fails to present any information regarding current and projected actual agricultural need, which is critical to ensure the beneficial end use of the diverted flows, as well as the mitigation of pollution impacts of discharged excess flows. Such information and analysis should include, at minimum, any and all available data on current agricultural needs and future plans, the projections and timeframes for potential agricultural buildout, and the impacts of project operations under different stages or scenarios of actual buildout.

[4] *See Nā Kia'i Kai v. Nakatani*, 401 F. Supp. 3d 1097 (D. Haw. 2019).

F. The DEA fails to analyze the cumulative impacts of diversions from the Waimea River System by the Kōke'e and Kekaha Ditches.

The DEA also fails to analyze the cumulative impacts of diversions from the Waimea River system by both the Kōke'e and Kekaha Ditches, both purportedly for agricultural and energy uses. Environmental review documents are required to identify and analyze all impacts of a proposed action, including cumulative impacts. HAR §§ 11-200.1-18(d)(7), 11-200.1-2. "Cumulative impact" is defined as "the impact on the environment that results from the incremental impact of the action when added to other past, present, and reasonably foreseeable future actions regardless of what agency or person undertakes the other actions." HAR § 11-200.1-2 (emphasis added).

The Watershed Agreement states that "the KIUC project is intended to serve both energy and agricultural uses which will enable the Commission to review the water needs of both systems with the goal of reducing the diversion of water into the Kekaha Ditch system" (DEA, Appendix A at 2), and makes clear that future Kekaha Ditch diversions would depend on how the proposed WKEP's Kōke'e Ditch diversions are fully and effectively integrated into the irrigation delivery system on the Mānā Plain. According to the DEA, "[t]he Proposed Action would connect the Kōke'e Ditch Irrigation System to the Mānā Plain, and through Project related infrastructure could provide the primary source of water for irrigation to the agricultural fields on Mānā Plain now served by the Kekaha Ditch System." (DEA at 80; emphasis added.) The DEA also indicates that "[t]he 60% design for the Proposed Action includes two separate physical locations where the Project would tie directly into the existing and future planned irrigation infrastructure on Mānā Plain. This would allow for reduced diversions in the lower reaches of the Waimea River where native species are prevalent." (DEA at 80.) Beyond these general statements, the DEA fails to disclose and explain how project related infrastructure would integrate with Kekaha Ditch operations and agricultural plans on the Mānā Plain to ensure that the Kōke'e ditch would provide the primary source of water for irrigation to the agricultural fields on the Mānā Plain and enable total cumulative diversions to be reduced. These details are necessary to ensure compliance with the Watershed Agreement and to examine and disclose the cumulative impacts of all diversions of the Waimea River system.

Most troubling, however, is the DEA statement that the "Phase Two IIFS was established and approved on the Kōke'e Ditch Irrigation System for the Proposed Action and associated diversion and ditch operations, and with the understanding that the Kekaha Ditch Irrigation System would be operating simultaneously for both irrigation and hydroelectric purposes." (DEA at 144.) This conflicts with the Watershed Agreement, which provides that the Waiawa power plant on the Kekaha Ditch "must be either decommissioned or repowered to operate using such waters as are reasonably related to agricultural (as opposed to energy) uses." (DEA, Appendix A at 10.) The intent of the Watershed Agreement is that the proposed WKEP Kōke'e diversions would supply irrigation to the Mānā Plain so that diversions from the

Kekaha ditch could be reduced. Additionally, water should be diverted only insofar as it is needed for agriculture, and not just energy production. (DEA, Appendix A at 10.)

In any event, if KIUC believes that both the Kōke'e and Kekaha Ditches should be allowed to continue to divert flows for both irrigation and hydroelectric purposes, then all the more the DEA must disclose and analyze the cumulative impacts of those double diversions, including the impacts on the river ecosystem and the pollution impacts of dumping excess flows. The DEA does not even mention the existing Kekaha Ditch diversion and KAA's associated agricultural and hydropower uses, nor does it disclose the proposed interactions between those diversions and uses and the WKEP. Instead, the response to questions raised during KIUC's public outreach misleadingly claims that the Waiawa power plant is "not part of this project and [has] no relationship." (DEA, Appendix J PDF at 940.) Similarly, the DEA maintains that the majority of the stream habitat in the watershed is downstream of the Waiahulu diversion on the Kekaha Ditch side, which it maintains is "not within the Project area." (DEA at 105.) This ignores the recognized and understood interrelationship between the proposed project's diversions through the Kōke'e Ditch and additional diversions through the Kekaha Ditch and contradicts HRS chapter 343's requirement to analyze the cumulative impacts of diversions by both ditch systems.

G. <u>The DEA fails to analyze the economic feasibility of the proposed WKEP if stated timelines are not met</u>.

Proponents of the WKEP have stressed the need for prompt review, approvals, and permitting in order to optimize the use of federal tax credits, which are necessary to the economic feasibility of the proposed WKEP and decrease over time. In order to meet federal tax credit deadlines, the DEA sets forth the following project schedule:

> It is expected that the HRS Chapter 343 process will be completed by the end of 2021. Upon completion of the HRS Chapter 343 process, permits would be obtained . . . Construction of the Proposed Action is expected to begin upon completion of all necessary and required permits and approvals, which is estimated to be in 2022 or the first quarter of 2023 and be completed by 2024 or mid-2025.

(DEA at 66.) The DEA lists at least 17 federal, state, and county permits or approvals that may be required for the proposed project and include, in part, a long-term water lease, a conservation district use permit, and historic preservation review. (DEA at 67-68.) The DEA fails to discuss how potential delays in permitting and approvals may affect federal tax credit eligibility and how, in turn, that will affect the economic feasibility and net benefits of the project.

KIUC has already experienced significant delays in acquiring the permitting and approvals needed to meet its obligations under Phase One of the Watershed Agreement. Four years after the Watershed Agreement went into effect, KIUC is <u>still</u> not in compliance with

gauging and monitoring requirements due to delays in permitting and approvals. An analysis of economic impacts is an included part of the environmental review process. HAR §§ 11-200.1-18(d)(7), 11-200.1-2. Given KIUC's representation that significant delays in approvals and permitting could affect the timing of the project and the availability of tax credits, accounting for delays is crucial to understanding and reviewing the overall economic impacts of the project.

H. The DEA fails to address the potential for climate change to affect the availability of streamflow necessary to operate the proposed WKEP.

The DEA acknowledges that changes due to climate change are already affecting Hawai'i through, among other factors, changing rainfall patterns and decreasing stream flows. (DEA at 139.) The DEA further recognizes that there would be "economic impacts resulting from a downward trend in streamflow since total volume of water that is available for diversion directly correlates to the amount of energy produced by the hydroelectric facility." (DEA at 143.) Apart from this general passing statement, the DEA offers no analysis regarding the impacts, such as the relationship between decreases in flows and resulting decreases in economic benefits, and any actions or contingencies to mitigate these impacts. Such disclosure is critical to understanding the proposed project's true, long-term economic feasibility and impacts to KIUC ratepayers.

I. The DEA should fully address impacts related to greenhouse gas emissions.

The DEA states that operation of the proposed WKEP would not contribute to global greenhouse gas emissions ("GHG") and climate change. (DEA at 142.) In its analysis of GHG impacts, the DEA should also address the emerging research and concerns indicating that reservoirs often emit large amounts of methane and carbon dioxide (from submerged vegetation, nutrient inflows, etc.). Studies have found that some reservoirs have GHG emissions equivalent to fossil fuel power plants.[5] The DEA should examine these issues in the context of the proposed project and its rehabilitation and use of the Pu'u Lua, Pu'u 'Ōpae, and Mānā Reservoirs and include all such impacts in its overall analysis and proposed mitigation of life-cycle GHG emissions.

[5] *See* Kavya Balaraman, 100+ hydro plants have greater warming impacts than fossil fuels: EDF study, Utility Dive, Nov. 19, 2019, https://www.utilitydive.com/news/hydropower-emissions-fossil-fuels/567572/; *see also* Chris Mooney, Reservoirs are a major source of global greenhouse gases, scientists say, The Washington Post, Sept. 28, 2016, https://www.washingtonpost.com/news/energy-environment/wp/2016/09/28/scientists-just-found-yet-another-way-that-humans-are-creating-greenhouse-gases/.

J. The DEA fails to address the end-of-life-cycle disposition for the project.

The DEA states that "[a]t the end of the project life, the project's lands and water would be available to continue as an energy and/or irrigation project for other purposes as appropriate." (DEA at 183.) This general statement offers no insight into the end-of-life-cycle disposition of the project components, either during or after the proposed 65-year lease term of the project. The DEA should include plans for such disposal, recycling, clean up, and/or restoration of the project site and components, and the associated impacts.

Conclusion

In sum, Pōʻai Wai Ola has serious concerns regarding the DEA's failure to fully address the short- and long-term direct and cumulative impacts of the Proposed Action. The historic significance of this project and its potential for lasting impacts for decades to come necessitates full and meaningful analysis of impacts in an EIS, rather than misleading claims that the flow diversion impacts of the proposed project are already "existing," or dismissive conclusions that directly interconnected issues or concerns are "not part of the project." We look forward to proper disclosure of the project's environmental impacts and proposed mitigation measures in future environmental review documents. In light of the expressed urgency in the proposed project timetable, we also continue to recommend that KIUC proceed directly to preparing a full EIS to minimize delays. If you would like to discuss these comments further or have any questions, please feel free to contact me by email at ebryant@earthjustice.org or by telephone at (808) 599-2436.

Sincerely,

Elena L. Bryant

Elena L. Bryant
EARTHJUSTICE
Attorneys for Pōʻai Wai Ola/West Kauaʻi Watershed Alliance

cc: Kauaʻi Island Utility Cooperative
5362 Kumole Street
Kapaʻa, Hawaiʻi 96746
Attn: Dawn Huff
dhuff@joulegroup.com

SSFM International
99 Aupuni Street, Suite 202
Hilo, Hawaiʻi 96720
Attn: Jennifer Scheffel
jscheffel@ssfm.com

CERTIFICATE OF SERVICE

I hereby certify that on this date, a copy of the foregoing document was duly served upon the following individuals as follows:

DEAN NISHINA
ACTING EXECUTIVE DIRECTOR
DEPARTMENT OF COMMERCE AND
CONSUMER AFFAIRS
DIVISION OF CONSUMER ADVOCACY
dean.k.nishina@dcca.hawaii.gov
consumeradvocate@dcca.hawaii.gov

Via Electronic Mail

KENT D. MORIHARA
LIANNA L. FIGUEROA
JAMIE C. YOSHIKANE
Kent.morihara@stratlaw.com
Lianna.figueroa@stratlaw.com
Jamie.yoshikane@stratlaw.com

Counsel for KAUA'I ISLAND UTILITY
COOPERATIVE

Via Electronic Mail

BRYAN C. YEE
GREGG J. KINKLEY
Deputy Attorneys General
HAWAI'I STATE ENERGY OFFICE
bryan.c.yee@hawaii.gov
gregg.j.kinkley@hawaii.gov

Via Electronic Mail

DATED: Honolulu, Hawai'i, December 13, 2021.

/s/ Elena L. Bryant
ISAAC H. MORIWAKE
ELENA L. BRYANT
EARTHJUSTICE

Attorneys for Pō'ai Wai Ola/
West Kaua'i Watershed Alliance

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